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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FORREST BUGHER, *et al.*,
Petitioners,

v.

JACK FEIGHTNER, *d/b/a*
FEIGHTNER EXCAVATING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether in an action brought in a federal district court by plan trustees under the Employee Retirement Income Security Act of 1974 against a delinquent employer, the defendant employer is entitled to a jury trial.*

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* The following are the parties named in the complaint as plaintiffs (petitioners) herein: Forrest Bugher, Richard Wren, Reese Hammond, J. A. McMahon, A. W. McIntyre, Hailey Roberts, George Kall, and Richard E. Dennis, as trustees of the Central Pension Fund of International Union of Operating Engineers and Participating Employers; Richard E. Dennis, Donald L. Moritz, Richard W. Kelly, Joe D. Pirtle, Wardell I. Riggs and James Butler, as trustees of the Health and Welfare Funds of Local 841, I.U.O.E.; and James Butler, William J. Shore, Howard Mills, Jr., Richard Rechter, Tom Blackburn, John Schutt, Leon Beaty, and Gene Marksbury, as trustees of the I.U.O.E. Local No. 103-181 Apprenticeship and Training Fund.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Forrest Bugher, et al. ("the Trustees") respectfully petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's decision of December 19, 1983 in *Bugher v. Feightner*, No. 81-2899.

OPINIONS BELOW

The opinion of the court of appeals is reported at 722 F.2d 1356 (7th Cir. 1983) and appears herein as Appendix A. The district court's memorandum opinion pertaining to the issue herein, as well as its findings of fact and conclusions of law and supplemental judgment are unreported and appear as Appendices C, D and E, respectively. The order of the court of appeals denying the Trustees' petition for rehearing with suggestion for rehearing en banc appears as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1983. A timely petition for rehearing with suggestion of rehearing en banc was denied on February 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

STATUTES INVOLVED

This case involves section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185 (1980) (hereinafter referred to as the "LMRA"), and sections 502 and 515 of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1132, 1145 (1980) (hereinafter referred to as "ERISA"). The text of these statutory provisions is set forth in Appendix F.

STATEMENT OF THE CASE

Petitioners, the Trustees of the Central Pension Fund of the International Union of Operating Engineers and Participating Employers (the "Trustees"), commenced this action on behalf of their beneficiaries in the district court against respondent Jack Feightner doing business as Feightner Excavating Company ("Feightner") to obtain specific performance, pursuant to section 502 of ERISA, of the terms of the agreements and declarations of trust establishing the respective fringe benefit funds. Specifically, the Trustees sought relief from the district court against Feightner's continuing refusal to comply with the fringe benefit obligations of its collective bargaining agreements, including its refusal to submit the required monthly contribution reports and contributions, and its refusal to permit a complete audit of its payroll records as required by the trust agreements. Appendix ("App.") C, at 15a.

Feightner answered the complaint, raising certain affirmative defenses and annexing a jury demand. Upon the

motion of the Trustees, the district court struck Feightner's jury demand on the grounds that the cause of action was purely an equitable action. App. C.

The case later proceeded to trial before the court on the issues of whether or not Feightner was obligated under the collective bargaining agreements and required to comply with the fringe benefit contribution obligations contained in the trust agreements. App. D.

On October 1, 1980, the district court entered findings of fact and conclusions of law and awarded the Trustees specific performance, liquidated damages and attorneys' fees against Feightner. App. D, at 26a-27a. The district court found that Feightner had been an active member of a multi-employer bargaining group, authorized to negotiate on its behalf, which had negotiated the collective bargaining agreements in question, and that Feightner was bound because of its membership in that association to the terms of the collective bargaining agreements and trust agreements. App. D, at 19a-20a. The court also found that Feightner had accepted the benefits of the agreements with actual knowledge of those benefits, and had in fact been in compliance with its obligations under the agreements during the years 1971 through 1973. App. D, at 21a. The court also found that Feightner's failure to continue compliance was based solely upon it bad faith and claimed financial problems, and not the alleged absence of a contractual obligation. App. D, at 21a and 24a.

In its judgment, the district court awarded the Trustees specific performance of their rights under the trust agreements, including the sums which had been determined due on a partial audit, and the court directed that a complete audit be conducted thereafter. The district court retained jurisdiction for the entry of supplemental orders, and also awarded prejudgment interest, audit and attorneys' fees to the Trustees pursuant to the trust agreements. App. D, at 26a-28a.

In entering its findings of fact and conclusions of law, the court also made the specific finding that Feightner had delayed the proceedings in bad faith and had presented "no credible evidence" to support any defenses to the action, and that it had delayed the proceedings solely on the basis of bad faith. App. D, at 24a.

The United States Court of Appeals for the Seventh Circuit vacated the judgment and remanded the case for a new trial. App. A. In an opinion by Senior District Judge Campbell, sitting by designation (joined by Judge Bauer), the panel held that the district court had improperly struck Feightner's jury demand. The panel began its analysis by inquiring as to whether Congress had intended section 502(a)(3) to create an exclusive and purely equitable remedy for fringe benefit fund trustees seeking to enforce an employer's contribution obligations. The panel reviewed portions of the legislative history of ERISA and concluded that it did not in any way alter the preexisting remedies for enforcement of collective bargaining agreements provided by section 301 of the LMRA. App. A, at 5a-8a. Accordingly, the panel concluded that the Trustees' rights to equitable relief under section 502 were not exclusive, that the Trustees retained their right to obtain relief at law under section 301, and that in the absence of specific findings by the district court that the remedy at law was inadequate, the relief actually given by the district court would be construed as relief at law for which Feightner should have been provided an opportunity for a jury trial. App. A, at 8a-9a.

Judge Wood filed a concurring opinion (in which Judge Bauer also joined) emphasizing that the panel decision was based upon the district court's failure to base its award of specific performance on findings that the remedy at law was inadequate. App. A, at 10a. Judge Wood suggested that the Trustees could not proceed under ERISA section 502 without making an initial showing that their remedy at law was inadequate, and in the

absence of such a showing, the Trustees were limited to proceeding under section 301 of the LMRA. App. A, at 10a-11a.

A timely petition for rehearing with a suggestion for rehearing en banc was filed by the Trustees thereafter. The Trustees' petition was denied without opinion. App. B.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS INCORRECTLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT BECAUSE THE DECISION DISREGARDS THE EXPRESSED INTENT OF CONGRESS AND THE PLAIN MEANING OF THE STATUTES.

It has long been settled that Congress may create new rights and remedies which can be enforced in proceedings without the participation of a jury. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Congress has done so in this case, and failure of the court of appeals to recognize this fact has led it unnecessarily to decide an important federal issue on constitutional grounds. In reality this case can and should have been decided on statutory grounds alone. By needlessly introducing a constitutional issue into the case, the court of appeals has created a serious conflict both with this Court's decisions and with the expressed purposes of Congress.

In order to determine whether or not there is a right to a jury trial in a statutory cause of action, this Court has fashioned a two-part test. First, since a statute should be construed, if "fairly possible" to avoid constitutional questions, the court must determine whether Congress has expressed a purpose to create a purely equitable cause of action for which a jury trial cannot be held. *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971). If this is not possible, then the court must determine if the remedy sought is essentially

relief at law or at equity. In the former case, a jury must be available consistent with the Seventh Amendment. U.S. Const. amend. VII; *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Curtis v. Loether*, 415 U.S. 189 (1974).

The court of appeals misapplied this test. Had the test been applied properly, the constitutional issue would not have been reached and the issue would have been determined upon the expressed intent of Congress. This error and the resulting nullification of an act of Congress requires this Court to grant the Writ.

The court of appeals misinterpreted the intent of Congress in three respects. First, the court ignored substantial evidence in the legislative history that Congress intended to create a purely equitable remedy. The extremes to which the court was forced to go in order to ignore this evidence are indicated by the fact that the court of appeals quoted selected portions of the legislative record supporting its position when read alone, while omitting adjacent text showing that read as a whole the opposite meaning was intended. Second, the court ignored the intent of Congress by reading only one portion of the relevant statute, and ignoring other relevant provisions showing the existence of a comprehensive legislative scheme. Finally, as a consequence of its misunderstanding of the legislation, the court of appeals brought about a result which makes it impossible to obtain access to the rights and remedy created by the statute.

A. The Court of Appeals Disregarded the Relevant Legislative History in Erroneously Concluding That Congress Had Not Expressed Its Intention That This Case Be Tried as an Equitable Action.

In determining whether or not Congress has intended to create a purely equitable action, this Court has looked at both legislative pronouncements and at the overall scheme and mechanisms of the legislation. *Lorillard v. Pons*, 434 U.S. 575 (1978); *Katchen v. Landy*, 382 U.S.

323 (1966). The court of appeals failed to make such a review, cited a small portion of the legislative history and, as a result, completely misconstrued the statute.

The court of appeals began its analysis with section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, and noted that section 301 made damages at law available. The court then decided that the case turned on the question of whether or not ERISA "altered the trustees' rights under" section 301 so as to deprive the Trustees of a legal remedy. 722 F.2d at 1358.[1]

In complete disregard of the sweeping changes brought about by ERISA, the court of appeals concluded that ERISA merely supplemented the Trustees' rights under section 301, because it found no evidence "that Congress found fault with the Court's application of [section 301] to lawsuits involving pensions or that it intended to render that application obsolete." 722 F.2d at 1359. Section 502 of ERISA was added simply to "counter a tendency of the courts to refuse [equitable] relief." *Id.*[2] More-

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[1] The Trustees note at the outset that whether or not ERISA "altered" their rights under section 301 is a misleading phrasing of the test. This Court has never required Congress to alter pre-existing rights in the process of creating new ones in order to preclude a jury trial. *See, e.g., Atlas Roofing Co., Inc. v. OSHRC*, 430 U.S. 442 (1977); *Katchen v. Landy*, 382 U.S. 323 (1966). A more accurate phrasing of the test which the court of appeals actually attempted to apply is whether or not ERISA was intended by Congress to be the Trustees' exclusive remedy. 722 F.2d at 1360. This test can only be identical to the rule in *Pernell* and *Curtis* if the ERISA remedy is assumed to be purely equitable, because only then is the remedy both "exclusive" and "equitable". The court of appeals made that assumption, but inexplicably assumed further that the same statute also supports a finding of non-exclusivity.

[2] The court of appeals does not explain why district courts would be any more willing to grant equitable relief under section 502 if, as it concludes, the same "adequate remedy at law" under section 301 still exists. The suggestion that the ERISA enforcement scheme exists merely to "counter a tendency" illustrates the extent to

over, the court found that the 1980 amendments to section 502 merely "bolster" the enforcement mechanism. *Id.* at 1360. Therefore, the court concludes, the Trustees' legal remedy under section 301 remains available, unaffected by ERISA.

The court's conclusions can only be characterized as result-oriented. The court of appeals went out of its way to decide this case on constitutional grounds by distorting the expressed intent of Congress. The case should be reviewed, however, because abundant evidence in the legislative history, completely disregarded by the court below, shows that it should not have been decided on constitutional grounds. ERISA and its 1980 amendments did not make merely minor adjustments in the Trustees' procedural and substantive rights as the court concluded.

The real purpose of the 1980 amendments to ERISA is found in the report of the Senate Labor and Human Resources Committee. The Committee found initially that employer delinquencies, such as those involved in this case, are the cause of serious, irreparable injuries to multiemployer fringe benefit funds, and impose incalculable burdens on them.

> Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due

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which the court of appeals ignores the legislative history of the statute. It also contradicts the court's conclusion that Congress had not "found fault" in the way the courts had been enforcing section 301, since prior to ERISA equitable relief had long been available under section 301. *Boy's Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235 (1970); *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957).

> amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys' fees and other legal costs arise in connection with collection efforts.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all of their employers.

Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., "S. 1076: The Multiemployer Pension Plan Amendments Act of 1980" (unnumbered Comm. Print, 1980) 43-44. The Committee went on to find that the preexisting enforcement and collection mechanisms under section 301 and the original provisions of ERISA, had proved totally inadequate. The full text, out of which the court of appeals relied upon only a single sentence, reads as follows:

> *Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly.* Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans's entitlement to the contributions. *This should not be the case. Federal pension law must permit Trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contribu-*

tions not be permitted to repudiate their pension promises.

Id. at 44.[3]

The legislative record, as a whole, shows clearly that Congress was acting to correct irreparable injuries to multi-employer plans being caused by employer delinquencies. These delinquencies are causing public harms and are not susceptible to the type of calculation and proof as would be required to award damages at law. Congress specifically found that the law needed to be changed to correct those problems. The changes enacted were clearly intended to make available a quick and efficient method for plans to recover delinquent contributions.[4] Because the court of appeals disregarded the strong evidence that

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[3] Emphasis is supplied to indicate text omitted by the court of appeals.

[4] By omitting the relevant portions of the legislative record, the court of appeals was able to avoid confronting the question of whether congressional intent to provide an "efficacious" remedy in and of itself is the same as intent to exclude a jury trial. That is certainly what it means to multi-employer plans, because jury trials limit the ability of the district courts to remedy the harms found by Congress. The experience of the plans has been that delinquent employers often seek to delay by using every procedural obstacle they can find. *Bugher v. Consolidated X-Ray Service Corp.*, 515 F.Supp. 1180 (N.D. Tex. 1981), *aff'd*, 705 F.2d 1426, *reh'g denied*, 711 F.2d 713 (5th Cir. 1983), *petition for cert. filed*. A jury demand can be a very effective maneuver because jury trials require longer and consecutive segments of the district court's trial calendars and generally are tried later than bench trials. District courts can and usually do squeeze a two-day bench trial between priority criminal trials on a regular basis, but a corresponding four or five-day jury trial may be delayed for many months. This is precisely why the Trustees chose to ask the district court here to strike the jury demand, and it is also why this petition is being brought. If Feightner had truly felt deprived of his rights, his proper remedy would have been a petition for *mandamus* or for an interlocutory appeal to force the district court to try the case to a jury. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Lorillard v. Pons*, 434 U.S. 575 (1978).

Congress "found fault" with the courts' previous enforcement history, it improperly decided this case on constitutional grounds.

B. The Court of Appeals Decision Conflicts With This Court's Decisions and Misreads Legislative Intent Because the Court of Appeals Disregarded the Relevant Portions of the Statute.

To decide whether or not Congress has created a purely equitable remedy, a court must consider the statutory scheme as a whole and not just isolated statutory provisions. *Atlas Roofing Company, Inc. v. OSHRC*, 430 U.S. 442 (1977); *Katchen v. Landy*, 382 U.S. 323 (1966). The court of appeals did not undertake such a review. This failure is critical because the disregarded sections of the statute define the Trustees' cause of action as purely equitable and designate the remedies to be equitable as well. Having failed to examine fully the statutory provisions which this Court requires it to consider, the case should be reviewed to bring the decision into conformity with the law and with the expressed purpose of Congress.

Sections 502(g) and 515 of ERISA, ignored by the court, do exactly what the court said ERISA does not do; they replace section 301 of the LMRA as the Trustees' remedy, they define that remedy as strictly equitable, and enumerate all proof required to obtain that remedy. In order to understand the disregarded legislative scheme it is necessary to undertake briefly the type of review which the court failed to attempt.

Section 515 of ERISA was added by the 1980 amendments and provides in its entirety as follows:

> Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with

> the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145 (1980). By itself, section 515 simply states a truism; if any employer is obligated to make contributions, it shall do so. This, without more, says nothing. Apparently, the court of appeals thought it says nothing more because in its only reference to the provision, the court claims that it merely "bolsters" the enforcement of ERISA. 722 F.2d at 1360. Such a construction requires the assumption that Congress makes a practice of enacting meaningless legislation.

To the contrary, section 515 does a great deal. First, unlike section 301, section 515 directly obligates employers to the terms of the plan. Under section 301, plans can only enforce their rights as third-party beneficiaries of the collective bargaining agreement, but ERISA gives them direct enforcement rights. Second, whereas in section 301 actions, plans may be subject to defenses under the collective bargaining agreement not related to fringe benefit obligations, under section 515, contribution obligations are always enforceable by plans unless inconsistent with law. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982).[5] This is significant because section 515 duplicates and expands the rights of the plans under section 301, something Congress would not ordinarily do unless it found fault with the prior remedy. Finally, section

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[5] In *Kaiser*, this Court held that the courts will not enforce illegal contracts and that the illegality defense was available under section 515. More recently, this Court ruled that an arbitration clause in the collective bargaining agreement did not require a plan to arbitrate the issue of for what employees an employer was required to make contributions. *Schneider Moving & Storage Co. v. Robbins*, —— U.S. ——, 52 U.S.L.W. 4476 (April 18, 1984). The decision in *Schneider* was based upon the narrow grounds that the trust agreements did not contain such a requirement. The enactment of section 515 thus gives the plan the right to enforce its trust agreements separate from the provisions of the collective bargaining agreement.

515 is directly linked to section 502(g) because it is made enforceable as a part of that provision.

Section 502(g) is, in fact, the only provision of ERISA that provides for the enforcement of section 515.[6] Section 502(g) can only be enforced under the jurisdictional provisions of section 502(a). Section 502(a)(3) was not amended to include section 515 actions explicitly, but there can be no question that such actions fall within section 502(a)(3), since enforcement of the terms of plans is listed in that section.[7] As a consequence, there is no way to understand what Congress meant by creating the enforcement provisions in section 502(a), without fully considering the connected provisions of sections 502(g) and 515. It is precisely because of the court of appeals' failure to do this, that the decision is grossly in error and in conflict with the decisions of this Court and the intent of Congress. In reality, Congress created a new remedy for plans based upon the need for expeditious and simple relief. The court of appeals ignored both the nature of what Congress created, and its inconsistency with trial by jury.

Given that Congress does not always express its intent unambiguously, the question that should have been asked and answered is what test or standard should be applied to determine congressional intent. This Court has provided considerable guidance in the past, and has stated the issue as whether or not Congress has created an enforcement scheme which is fundamentally inconsistent with trial by jury. *Katchen v. Landy*, 382 U.S. at 339.

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[6] The text of section 502(g) is set out in Appendix F.

[7] The extent to which Congress was dissatisfied with the prior enforcement of plan rights by the Courts is further illustrated by the fact that Congress enacted legislation to solve the problems of section 301 not once, but twice. Congress gave direct enforcement rights to plans in the 1974 version of ERISA, and then enacted even more specific and tougher legislation (sections 502(g)(2) and 515) in 1980.

See, also, Atlas Roofing Co., Inc. v. OSHRC, 430 U.S. at 454, n.11. In the application of this test, this Court has focused on the "functional justification" inherent in the statutory scheme which is inconsistent with jury trials. *Curtis v. Loether*, 415 U.S. at 195. The single "functional justification" which this Court has found has been the harmful delays which jury trials entail. If Congress has found that delay creates serious harms, and has created a statutory scheme to eliminate delays, this Court has consistently enforced that scheme to preclude jury trials. The court of appeals ignored this test.

In *Katchen v. Landy*, the issue was whether there was a right to a jury trial in bankruptcy proceedings to recover preferences. This Court held that Congress had authorized summary proceedings without a jury because it had created a system contemplating prompt trials. 382 U.S. at 339. Similarly, in *Atlas Roofing Co., Inc. v. OSHRC*, this Court faced the question of whether or not Congress could assign the adjudication function under occupational safety legislation to an administrative body consistent with the right to trial by jury.[8] This Court upheld the statutory scheme and ruled that such an assignment to a body other than a court of law was permissible when Congress "concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate. . . ." 430 U.S. at 460. In *Atlas*, the congressional finding of inadequacy was based upon the inability of state statutory and common-law remedies to protect workers from occupational injury, and the remedy fashioned was intended to regulate workplace safety to prevent injuries. Enforcement delays would frustrate that remedy.

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[8] *Atlas* was not the first case to confront this particular issue. The Court also faced this issue (with a somewhat different precedential background) in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The decision in *Jones & Laughlin* was completely consistent with the test under discussion and was similarly based upon the statutory scheme precluding jury trial.

Because it ignored the statutory scheme, the court of appeals disregarded the congressional finding that the pre-existing legal remedies under section 301 were totally inadequate to meet the needs of employee benefit plans, because they permitted harmful delays. Congress created a new legislative program in the public interest to regulate employee benefit plans, protect plan participants and, provide plans direct access to federal courts, with exclusive jurisdiction to enforce their rights for the good of their beneficiaries. Six years later, Congress found even this to be inadequate to meet the needs of the plans, and created further and more specific rights and remedies for them. Section 515 was added to sever the rights of plans from the unions and to create an affirmative obligation on employers. Section 502(g) was substantially amended to circumscribe and define the remedy available to plans to further the purposes of section 515, and to eliminate any doubt that employer obligations are specifically enforceable in federal courts. Section 502(g) defines the remedy in terms of the enforcement of plans, not in terms of recovery of damages.[9] Apart from whether or not the remedy is legal or equitable, for constitutional purposes not here relevant, the significance of this system of defining the remedy in equitable terms cannot be interpreted in any way except that Congress intended to create an exclusive and purely equitable remedy.

This case is the same as *Katchen* and *Atlas* in that Congress has found a need for a fast and efficient remedy to avoid the harmful delays which trial by jury entail. In that sense, Congress has converted what may appear as "legal" rights into "equitable" rights by congressional

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[9] Specific performance, long recognized as exclusively within the power of courts of equity, cannot have been mandated by Congress any more clearly than was done in sections 515 and 502(g). Congress clearly knows how to create actions for damages and could have done so had it wished. The courts should also give effect to the clear significance of describing the remedy in specific enforcement terms.

finding of need. *Katchen v. Landy*, 382 U.S. at 336. This is so because the enforcement mechanism of ERISA, intended to provide a speedy remedy, is fundamentally inconsistent with trial by jury. Here there are functional justifications to exclude juries based upon the findings of Congress that serious and irreparable harms are caused to plans by delays.

The decisions of this Court clearly required the court of appeals to give careful consideration to the statutory program created by Congress. This case should be reviewed because the court of appeals failed to give any consideration to the relevant portions of the statute, leading it to reach an erroneous result which contravenes the intent of Congress.

C. The Failure of the Court of Appeals to Conform Its Decision to the Law Is of Great Importance Because It Effectively Nullifies an Act of Congress and Precludes Petitioners From Obtaining the Remedy Mandated by Congress.

The failure of the court of appeals to apply the law correctly is itself sufficient reason to grant the Writ, but the effect of these errors is so harmful that review is essential to prevent the complete nullification of an act of Congress. If this decision is permitted to stand, on remand the Trustees will be precluded from exercising the rights given them by Congress because they will be precluded from obtaining the relief provided in section 502(g).

The court of appeals has ruled that the Trustees have two separate causes of action, for legal or equitable relief under section 301, and for equitable relief only under section 502(a)(3). The court has also found that their right of action under section 301 will provide an adequate remedy at law so as to preclude the equitable remedy under section 502. As a consequence, the only way the Trustees can obtain the relief which Congress has man-

dated they receive under section 502(g), is to prove that section 301 is an inadequate remedy at law.

Congress has quite plainly said that they need make no such proof. Section 502(g) provides that simply upon showing that an employer is delinquent, the mandated relief is automatic. The court of appeals has, in effect, amended the statute to provide that the Trustees must prove delinquency and also prove that their supposedly alternative remedy under section 301 is inadequate. The necessary conclusion is that by the court's reasoning, Congress has enacted an enforcement scheme which cannot be given effect on the terms Congress set.

Whether intentional or not, this is the effect of the court's misinterpretation of congressional intent and its disregard of the statutory language. More importantly, the error derives from the fact that the remedy mandated is defined as purely equitable, and the necessary burden of proof for equitable relief has been met. The Trustees need not make a showing of irreparable injuries and inadequacy of the legal remedy because Congress has already done so.

As this Court recognized in *Atlas*, it is perfectly proper for Congress to make a legislative finding that irreparable injuries are being caused and that the existing remedies at law are inadequate, and to create a new remedy defined to be equitable.

> Congress found the common-law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation's working men and women. It created a new cause of action, and remedies therefor, unknown to the common-law, and placed their enforcement in a tribunal supplying speedy and expert resolutions of the issues involved.

430 U.S. at 461. Similarly, Congress found the pre-existing remedies available under section 301 and state

law inadequate to meet the needs and public interest it sought to serve in ERISA, and it created a new equitable remedy, access to which depends solely upon a factual showing of delinquency. No other interpretation is consistent with Congress' simultaneous creation of an exclusively equitable action under section 502(a)(3) and its designation of the mandatory remedy under section 502(g). If that mandatory remedy appears to be relief at law, it still must be considered equitable if Congress chooses to deem it specific performance. *Katchen v. Landy*, 382 U.S. at 336. But no matter how it is characterized, access to the remedy must be provided on the terms set by Congress, terms which the court of appeals has changed.

The fact that the remedy created by Congress in *Atlas* was to be enforced by an administrative agency, while ERISA entrusts enforcement to district courts does not alter this. Congress clearly considered the district courts capable of providing the remedies ERISA created and gave them a simple means to do so. Since enforcement of administrative orders generally requires district or appellate court action, Congress, finding no need for specialized or expert factual findings, skipped a step in the interest of speed, and entrusted enforcement to the district courts directly. This Court does not generally assume that Congress has decided "to choke the already crowded federal courts with new types of litigation." 430 U.S. at 455. Where Congress has brought a new type of litigation into the federal courts and narrowed the issues and remedies to simplify and expedite the proceedings, its clear intent to preclude jury trials is shown as much by the way the district court remedy was framed as it is by the legislative history and scheme.

This Court should grant the Writ and review this case in order to correct the failure of the court of appeals to give due consideration to the legislative history and clear meaning of the statute and to prevent the complete nullification of the remedies provided by an act of Congress.

II. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CREATES AN IRRECONCILABLE CONFLICT WITHIN THE CIRCUIT, AND WITH TWO OTHER CIRCUIT COURTS OF APPEALS.

Until the court of appeals' decision in this case, the law was clear and consistent. There was no right to jury trial in actions under section 502(a)(3) because that provision was limited to purely equitable actions. *In Re: Vorpahl*, 695 F.2d 318 (8th Cir. 1982); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980); *Wardle v. Central States*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). *See, also, Stamps v. Michigan Teamsters*, 431 F.Supp. 745 (E.D. Mich. 1977). The cited cases were actions brought by plan participants against plan trustees under section 502(a)(1)(B) of ERISA to recover benefits alleged to be due. In all of these cases the plaintiff sought money damages and considered those damages to be an adequate remedy. In all three cases, the courts of appeals held that Congress intended section 502(a)(1)(B) to permit equitable actions, that the actions brought were purely equitable and that as a consequence, the plaintiffs were not entitled to a jury trial.[10]

The court of appeals attempts to distinguish these cases on the disingenuous ground that they involved section 502(a)(1)(B) rather than section 502(a)(3). While the court is correct in saying that those actions were brought under a different subsection, that distinction is of no significance whatsoever because in all of these cases the issue required the interpretation of section 502 as a whole, and in a consistent manner. The other panels arrived at a consistent interpretation only by

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[10] In its efforts to distinguish *Wardle*, the panel of the court of appeals never explained why the alleged adequacy of a legal remedy is dispositive here, while the admitted adequacy of a legal remedy was not even considered relevant by the panel in *Wardle*.

reading subsections (a) (1) (B) and (a) (3) together and inseparably. This panel seeks to separate the two without any basis for doing so, except to justify an inconsistent result.

In *Vorpahl*, *Calamia* and *Wardle*, the courts of appeals were called upon to determine whether or not subsection (a) (3) created a purely equitable right of action. This was important because the plaintiffs therein sued under subsection (a) (1) (B) which permits either legal or equitable relief and the two subsections appeared to be redundant. This apparent redundancy was eliminated by recognizing that the statutory scheme created the right for beneficiaries to seek legal or equitable relief in either state or federal courts, while they could alternatively go to a federal court only to seek relief limited to equitable remedies. There is simply no rational explanation of this arrangement unless it is concluded that Congress created these exclusively federal equitable actions under (a) (3) for the express purpose of excluding juries from hearing them. The statute would be redundant otherwise.

The court in this case appears to have understood this fact, because it ultimately concedes that (a) (3) actions are purely equitable. 722 F.2d at 1360. Its conclusion, however, is that a plaintiff must still meet the prerequisites for equitable relief to obtain it under subsection (a) (3), and that the District Court having failed to make such a finding in its opinion, the Trustees were not entitled to relief under that provision.

This is the ultimate error to which the court's reasoning has led. Even if we set aside (as the court erroneously did) the fact that Congress has specifically provided that plans are entitled to sue under section 502 (a) (3) for violations of section 515 and receive the relief described in section 502(g), simply upon showing that the employer was delinquent in its contribution obligations, it still has not explained why the alleged failure to meet a burden of proof requires that the case be retried

to a jury. If the court is saying the case should be retried because the Trustees failed to meet their burden of showing irreparable injuries and an inadequate remedy at law, then the court should have remanded the case either to dismiss the claim for equitable relief, or for a new bench trial on that claim. *Laborers Fringe Benefit Funds v. Northwest Concerete*, 640 F.2d 1350 (6th Cir. 1981). It would still have been an incorrect decision, because as shown above, Congress has removed the requirement for such a showing in these cases. But at least such a decision would be procedurally consistent.

Instead, the court has left the Trustees with an intolerable dilemma. They can retry the case as if it were solely one under section 301, thereby avoiding the necessity of proving irreparable injuries, and settling for what Congress has found to be an inadequate remedy. The other option is to proceed under section 502(a)(3) and attempt to prove what Congress has said they need not prove.

This absurd result derives from the court's failure to follow the decisions in *Vorpahl*, *Calamia* and *Wardle*. The Trustees' allegedly adequate legal remedy has no more to do with the issue in this case, than the admittedly adequate legal remedies had to do with the issues in those cases. The dispositive issue is congressional intent. Congress intended that plaintiffs have alternative legal or equitable remedies under subsection (a)(1)(B), but that actions under subsection (a)(3) be equitable actions tried to the court. As the decisions of this Court show, that intent can and must be given effect.

CONCLUSION

For the foregoing reasons, Certiorari should be granted to review the Judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-2899

FORREST BUGHER, *et al.*,
Plaintiffs-Appellees,

v.

JACK FEIGHTNER d/b/a
FEIGHTNER EXCAVATING COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
No. IP 75-523-C—William E. Steckler, *Judge*

Argued September 16, 1982—Decided December 19, 1983

Before BAUER and WOOD, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior District Judge.* This is an appeal brought by defendant Jack Feightner, d/b/a Feightner Excavating Company, from a judgment entered after a

* The Honorable William J. Campbell, Senior District Judge of the United States District Court of the Northern District of Illinois, is sitting by designation.

non-jury trial. Plaintiffs, the trustees of certain union trust funds, brought this action seeking delinquent contributions allegedly due as the result of a collective bargaining agreement between the defendant and the union. Feightner denied liability, claiming at trial that the multi-employer collective bargaining association which had purportedly signed on his behalf did not have authority to bind him. Feightner also made a timely demand for jury trial, however the district court granted plaintiffs' motion to strike that demand. A bench trial was held and the trial judge found for the plaintiffs, entering a judgment against the defendant for the delinquent contributions, attorneys' fees, audit fees, costs, and a surcharge. Feightner brings this appeal contending that under the facts of this case he was not bound to the collective bargaining agreement, and that the district court erred in striking his demand for a jury trial.

Plaintiffs' complaint alleged that their claim arose under 29 U.S.C. § 1132, the civil enforcement provision of the Employee Retirement Income Security Act (hereafter "ERISA"), and 29 U.S.C. § 185(a) of the Labor-Management Relations Act. While seeking monetary relief the complaint only requested equitable remedies, i.e., an accounting and a grant of specific performance. Contemporaneously with the filing of his answer, the appellant demanded a jury trial. Prior to trial the appellees filed a Motion to Strike Defendant's Jury Demand and the issue was briefed for the court. The district judge granted the motion noting that plaintiffs had only requested equitable relief and that 29 U.S.C. § 1132(a)(3) only authorized that type of remedy. Feightner has appealed that ruling, noting that under *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) the form of remedy requested in the complaint does not control the characterization of the action as legal or equitable for purposes of the Seventh Amendment. Appellant argues that the complaint alleged, in essence, a breach of contract, a claim traditionally enforced in an action at law and thus triable to a jury un-

der the Seventh Amendment. For the reasons stated below, we agree with the appellant.

The claim asserted in the complaint arises solely under federal statutes. The Supreme Court stated in *Curtis v. Loether*, 415 U.S. 189 (1974):

> The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law. 415 U.S. at 194.

In analyzing the nature of the rights created by the statutes in issue we must first look to legislative intent and if that is not decisive we must determine whether rights and remedies of that type were traditionally enforced in an action at law or in equity, *see Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974).

The Labor-Management Relations Act was enacted in 1947 and was designed to permit the federal courts to create a federal common law of labor contracts, *see Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957). The statute is silent on the issue of the right to jury trial and the legislative history is similarly unenlightening. As a result, the Seventh Amendment issue has generally been resolved on a case-by-case basis through an analysis of the rights and remedies being asserted, *see e.g. Minnis v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW*, 531 F.2d 850 (8th Cir. 1975) (jury trial in employee action claiming breach of union's duty of fair representation); *Nedd v. United Mine Workers of America*, 556 F.2d 190 (3rd Cir. 1977), *cert. den.*, 434 U.S. 1013 (1978) (no jury trial in action by employee-beneficiaries to compel union to collect royalties for pension fund); *Cox v. C.H. Masland & Sons, Inc.*, 607 F.2d 138 (5th Cir. 1979) (jury trial in employee's action claiming breach of collective bargaining agreement by em-

ployer and breach of duty of fair representation by union).

The status of pensions within the statutory labor scheme was initially defined in *Inland Steel Co. v. N.L.R.B.*, 170 F.2d 247 (7th Cir. 1948), *cert. den.*, 336 U.S. 960 (1949). In that case the court concluded that pensions were a "condition of employment" within the meaning of 29 U.S.C. § 158(a)(5) and thus were mandatory subjects of the collective bargaining process. Thereafter, 29 U.S.C. § 185(a) became the jurisdictional and substantive basis for suits brought by plan trustees and unions to collect delinquent contributions for pension funds, *see Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis v. Mill Ridge Coal, Inc.*, 298 F.2d 552 (6th Cir. 1962); *Calhoun v. Bernard*, 333 F.2d 739 (9th Cir. 1964); *Huge v. Long's Hauling Co., Inc.*, 590 F.2d 457 (3rd Cir. 1978), *cert. den.*, 442 U.S. 918 (1979); *see also Alvares v. Erickson*, 514 F.2d 156, 162-163 fn. 3 (9th Cir. 1975). Under those cases the plan trustees are considered to be third party beneficiaries of the collective bargaining agreement between the union and the employer. In that capacity, the trustees can bring an action seeking damages for breach of contract, subject to the defenses of nonperforming promisors recognized at common law, *see Kaiser Steel Corp. v. Mullins*, 102 S.Ct. 851, 859 fn. 8 (1982). A suit for breach of contract seeking damages was traditionally an action at law and thus triable to a jury under the Seventh Amendment, *Scott v. Neely*, 140 U.S. 106, 110 (1891); *Dairy Queen, supra*, 369 U.S. at 477. Therefore, in an action brought for delinquent contributions under 29 U.S.C. § 185(a) either party can properly demand a jury trial.[1] Our an-

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[1] While this issue is apparently one of first impression, our holding is somewhat anticlimatic in view of the fact that jury trials have been held in two reported cases of this type (albeit without any discussion of the Seventh Amendment issue), *see Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis v. Kepple*, 185

alysis cannot end here, however, for we must also determine whether ERISA altered the trustees' rights under 29 U.S.C. § 185(a).

In 1974 Congress enacted ERISA which expanded the scope of remedies available to participants, beneficiaries, and fiduciaries of union pension plans. With regard to fiduciaries, the civil enforcement statute provides:

> (a) A civil action may be brought—
>
> * * * *
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title [relating to breaches of fiduciary duty];
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; 29 U.S.C. § 1132.

The plaintiffs' complaint in this case alleged a cause of action under § 1132(a)(3) which, by its own terms, authorizes only equitable actions. If that subsection is the only authority for a trustee's action against an employer, that is, if it was intended to supersede the trustees' third party beneficiary rights under 29 U.S.C. § 185(a), we would have no difficulty holding that there is no right to a jury trial in this case. However, a review of the statutory scheme and legislative history of ERISA demonstrates that 29 U.S.C. § 1132(a)(3) was intended to supplement rather than supersede the rights existing under 29 U.S.C. § 185(a).

F.Supp. 884 (W.D. Pa. 1960), aff'd 287 F.2d 409 (3rd Cir. 1961). We note that the district judge was not afforded the benefit of these cases in the briefs below, nor were they cited in the appellate briefs.

Initially, we note that § 514(d) of ERISA (29 U.S.C. § 1144(d)) provides:

> (d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(d) of this title) or any rule or regulation issued under any such law.[2]

Furthermore, the legislative history does not conflict with that provision. In Senate Report 93-127 the Committee on Labor and Public Welfare discussed existing law:

> At the federal level, there are essentially three federal statutes which, although accomplishing different purposes and vested within different federal departments for enforcement, are all compatible in their regulatory responsibilities. These are the Welfare and Pension Plans Disclosure Act (29 U.S.C. Sec. 301 et seq.), the Labor-Management Relations Act (29 U.S.C. Sec. 141, et seq.) and the Internal Revenue Code (I.R.C. of 1954, Secs. 401-404, 501-503).
>
> * * * *
>
> The Labor-Management Relations Act, Sec. 302, provides the fundamental guidelines for the establishment and operation of pension funds administered jointly by an employer and a union. The Act is not intended to establish nor does it provide standards for the preservation of vested benefits, funding adequacy, security of investment, or fiduciary conduct. Senate Report No. 127, 93d Cong. 2d Sess. reprinted in 1974 U.S. Code Cong. & Admin. News, pp. 4838, 4840, 4814.

These latter concerns were the major objectives of the proposed act:

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[2] Section 1031 relates to the repeal of the Welfare and Pension Plans Disclosure Act (which ERISA replaced) and § 1137(b) addresses potential conflicts of interest in the administration of the Act.

> [ERISA] is designed (1) to establish minimum standards of fiduciary conduct for Trustees, Administrators and others dealing with retirement plans, to provide for their enforcement through civil and criminal sanctions, to require adequate public disclosure to the plan's administrative and financial affairs, and (2) to improve the equitable character and soundness of private pension plans by requiring them to: (a) vest the accrued benefits of employees with significant periods of service with an employer, (b) meet minimum standards of funding and (c) guarantee the adequacy of the plan's assets against the risk of plan termination prior to completion of the normal funding cycle by insuring the unfunded portion of the benefits promised. House Report No. 533, 93rd Cong. 2d Sess. reprinted in 1974 U.S. Code Cong. & Admin. News, pp. 4639, 4655-4656.

There is no evidence in the legislative history that Congress found fault with the court's application of 29 U.S.C. § 185(a) to lawsuits involving pensions or that it intended to render that application obsolete. While 29 U.S.C. § 1132(a)(3) grants fiduciaries (as well as participants and beneficiaries) the right to seek equitable relief, that provision was designed to counter a tendency of the courts to refuse such relief:

> Courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording. Senate Report No. 127 *supra* at 4842.

See also, Laborers Fringe Benefit Funds v. Northwest Concrete, 640 F.2d 1350 (6th Cir. 1981).

In 1980, Congress enacted the Multiemployer Pension Plan Amendments Act which contained substantial modifications of ERISA. One of the concerns expressed in the legislative history was that:

> [S]imple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. Staff of the Senate Comm. on Labor and Human Resources, S. 1076: The Multiemployer Pension Plan Amendments Act of 1980, 96th Cong., 2d Sess. 44 (unnumbered Comm. Print April 1980) (1980 Senate Labor Comm. Print)

To address that problem Congress added 29 U.S.C. § 1145 and bolstered the enforcement provisions of 29 U.S.C. § 1132. While one of the legislative objectives was to simplify delinquency collection actions, there was no evidence of an intention to eliminate the right to a jury trial or to make ERISA the exclusive means of enforcement.[3]

We conclude that plaintiffs had a legal remedy available to them, i.e., a claim for damages for breach of contract under 29 U.S.C. § 185(a), as well as an equitable remedy under 29 U.S.C. § 1132(a)(3). In this situation the Seventh Amendment issue is controlled by *Dairy Queen, supra.* The form of plaintiffs' complaint does not control the characterization of the action as either equitable or legal. 369 U.S. at 477-478. The necessary prerequisite to the right to maintain an equitable action is the unavailability of an adequate remedy at law, 369 U.S. at 478. There has been no showing that the legal remedy is inadequate. Even assuming that an analysis of the defend-

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[3] We note that the floor managers of the proposed Act both stated that they endorsed cases such as *Lewis v. Benedict Coal Corp., supra; Long's Hauling Co., Inc., supra*; 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson), 126 Cong. Rec. S11673 (daily ed. Aug. 26, 1980) (remarks of Sen. Williams). While those cases were cited for their discussions of appropriate defenses to trustee collection actions, it is interesting to note that all three involved actions brought solely under 29 U.S.C. § 185(a), including *Huge* which was decided after the enactment of ERISA.

ant's business records is necessary in order to compute the measure of damages, 369 U.S. at 479. Therefore, whether we construe plaintiffs' complaint as solely a legal claim or as a joinder of legal and equitable actions, *see* 369 U.S. at 481 (Harlan, J. concurring), the appellant was entitled to a jury trial on the legal issues.

Our holding herein does not conflict with this court's decision in *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980). *cert. den.* 449 U.S. 1112 (1981). In that case, the court concluded that there was no right to a jury trial in an action brought by a beneficiary under 29 U.S.C. § 1132(a)(1)(B). The court reasoned that such actions were traditionally equitable in nature and that Congress had indicated no intention of altering that characterization in its promulgation of the ERISA enforcement provisions, *accord, Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980).[4] Thus, *Wardle* addressed a different subsection of 29 U.S.C. § 1132 than we do here and involved a claim with a different historical background. We also do not find that there is any conflict between our holding and that of the Sixth Circuit in *Laborers Fringe Benefit Funds, supra.* The sole issue in that case was whether a plan trustee could seek an injunction against an employer for failing to comply with the plan contribution provisions of the collective bargaining agreement. The court concluded that injunctive relief was authorized under 29 U.S.C. § 1132(a)(3) and was appropriate under the facts of the case before it. While the court emphasized the congressional intent to encourage the use of equitable remedies in ERISA cases, it still determined, as a preliminary matter, that there was not an adequate remedy at law before authorizing the issuance of the injunction.

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[4] An identical conclusion was reached in an employee-beneficiary action brought under 29 U.S.C. § 185(a), *Nedd v. United Mine Workers of America, supra.*

Having determined that the appellant was entitled to a jury trial by virtue of the Seventh Amendment, we need not reach the factual issues raised by him on this appeal. Accordingly, the judgment is vacated and the case remanded for proceedings consistent with this opinion.

BAUER, *Circuit Judge*, concurs in Judge Campbell's majority opinion and also in Judge Wood's concurrence, which follows.

WOOD, *Circuit Judge*, concurring.

While I concur with the majority opinion, I respectfully must add a few points to round out what I believe is the correct approach to the right to trial by jury under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132.

I agree that ERISA § 502 was enacted to encourage the courts to grant equitable relief. This policy position was codified, however, with the qualification in § 502(a)(3) that the action seek "appropriate" equitable relief. The legislative history provides no indication that Congress intended to create a new form of equitable action that would be free from the conventional analysis which courts generally must perform to determine whether equitable relief would be appropriate in a given case. Thus, before granting equitable relief under ERISA § 502(a)(3), a court first must determine that equitable relief is appropriate.

When union fund trustees have sued under § 502(a)(3)(A) to enjoin an employer from future violations of collective bargaining agreements, the courts have assessed irreparable harm, balance of hardships, and so forth, to determine whether an injunction should issue. *See, e.g., Laborers Fringe Benefit Funds—Detroit Vicinity v. Northwest Concrete & Construction, Inc.*, 640 F.2d 1350

(6th Cir. 1981); *Central States, Southeast and Southwest Areas Pension Fund v. Admiral Merchants Motor Freight, Inc.*, 511 F. Supp. 38 (D. Minn. 1980), *aff'd sub nom. Central States, Southeast and Southwest Areas Pension Fund v. Jack Cole-Dixie Highway Co.*, 642 F.2d 1122 (8th Cir. 1981); *Operating Engineers Central Pension Fund v. Joski Construction Co.*, 441 F. Supp. 849, 850 (E.D. Wis. 1977) (because Congress did not supply a different test, court applies the usual test before granting injunction). Likewise under § 502(a)(3)(B), the trial court must look beyond the fact that plaintiffs seek relief sounding in equity under an ERISA provision that expressly mandates equitable relief. As in any suit seeking specific performance, a grant of equitable relief is in the court's sound discretion. Equitable relief is available only as a substitute when the legal remedy is inadequate or impracticable. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962); 4 S. Symons, *Pomeroy's Equity Jurisprudence* § 1401 (5th ed. 1941). As the majority opinion notes, the necessary prerequisite of inadequacy of the legal remedy was not met in this case.

If equitable relief is appropriate in a particular case, a court must allow the plaintiff to proceed under ERISA § 502 with no right to trial by jury. If, however, a court finds equitable relief inappropriate, the plaintiff may not proceed under § 502. Frequently, as in the instant action, the plaintiff also sues under Labor-Management Relations Act (LMRA) § 301, 29 U.S.C. § 185. This provision in its express language provides a jurisdictional basis, and, under *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957), also provides a substantive basis for both legal and equitable claims under the federal labor common law. The right to a jury trial under LMRA § 301 is decided on a case-by-case basis depending upon the nature of the claim. Once having decided that the suit is not equitable for ERISA purposes, the same holds true under LMRA, and a right to jury trial exists.

This ERISA analysis does not conflict with our decision in *Wardle v. Central States, Southeast and South-West Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). In *Wardle* the plaintiff styled his suit as one for damages, and the legal remedy would have been adequate under the circumstances. While we hold here that a suit under ERISA for specific performance is really a legal cause of action, in *Wardle* we held that an ERISA damage action was equitable and denied the plaintiff's jury trial request.

Unlike the present case, *Wardle* involved an action under ERISA § 502(a)(1)(B) by a potential beneficiary of a trust fund against the trustees for refusal to pay pension benefits. We held that, in an ERISA action reviewing the trustees' decision as to disbursements from the trust, the role of the federal courts is merely to determine whether the trustees' action was arbitrary, capricious, or in bad faith. *Id.* at 824. Thus, ERISA maintains the limited judicial review of trustee actions that developed under the law of trusts, for both federal courts and state courts which have concurrent jurisdiction over § 502(a)(1)(B) claims, *see* 29 U.S.C. § 1132(e)(1). Due to the trust nature of such suits and the limited judicial role, *Wardle* determined that congressional silence on the right to a jury trial under ERISA reflects an intention to continue the historical treatment of this type in equity. *Id.* at 829.[1]

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[1] The Fifth and Eighth Circuits have followed *Wardle*. *See In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980); *accord Diano v. Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds*, 551 F. Supp. 861 (N.D. Ohio 1982). Another line of cases, however, has held that equitable relief is not available to participants and beneficiaries under ERISA § 502(a)(1)(B) because implying equitable relief under this subsection would be superfluous when it is expressly mandated under § 502(a)(3). *See Pollock v. Castrovinci*, 476 F. Supp. 606 (S.D.N.Y. 1979), *aff'd without opinion*, 622 F.2d 575 (2d Cir. 1980); *Stamps v. Michigan Teamsters Joint Council No. 43*, 431 F. Supp. 745 (E.D. Mich. 1977).

The instant case, in contrast, involves trustees suing an employer on his contractual obligations to the trust. No clear historical pattern of equitable treatment exists for this type of suit, which is not so permeated with the traditionally equitable nature of trusts as is a beneficiary's suit against the trustees.[2] Further, the judicial role in such cases is not limited to review of the trustees' actions under the arbitrary and capricious standard, but is the same as in any contract action. That plaintiffs sued not for their own recovery but on behalf of the trust is not enough to make this suit equitable. In other contexts where a trustee sues a promisor on a contract with the trust, the existence of the trust as the direct promisee would not alone displace the otherwise standard contractual nature of the action. *Cf. Ross v. Bernhard*, 396 U.S. 531, 538 (1970) (right to jury trial on legal claims in shareholder's derivative action). Thus, while *Wardle* assumed that equitable actions may be brought under § 502(a)(3), our discussion of the inherently equitable nature of suits by beneficiaries against fiduciaries did not extend to suits by fiduciaries against employers, and we did not eliminate the prerequisite that suits under § 502(a)(3) be genuinely equitable.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[2] A survey of cases where trustee actions against employers under LMRA and ERISA went to trial reveals some bench trials, *see, e.g., Audit Services, Inc. v. Rolfson*, 641 F.2d 757, 760 (9th Cir. 1981) (right to jury trial not raised); *Calhoun v. Bernard*, 333 F.2d 739, 740 (9th Cir. 1964) (same); *Central Pension Fund of the International Union of Operating Engineers and Participating Employers v. Bryant*, No. 80-3175 (C.D. Ill. Dec. 31, 1980) (unpublished opinion) (denying defendant employer's jury trial demand, relying on Judge Steckler's order in the instant case), and some jury trials, *see, e.g., Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 462 (1960); *Lewis v. Kepple*, 185 F. Supp. 884, 886 (W.D. Pa. 1960), *aff'd*, 287 F.2d 409 (3d Cir. 1961) (memorandum).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

February 14, 1984

Before

HON. WILLIAM J. BAUER, *Circuit Judge*

HON. HARLINGTON WOOD, JR., *Circuit Judge*

HON. WILLIAM J. CAMPBELL, *Senior District Judge**

FORREST BUGHER, *et al.*,
Plaintiffs-Appellees,

vs.

JACK FEIGHTNER d/b/a
FEIGHTNER EXCAVATING COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. IP 75-523-C

William E. Steckler, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Forrest Bugher, et al., Plaintiffs-Appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable William J. Campbell, Senior Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP 75-523-C

FORREST BUGHER, *et al.*

v.

JACK FEIGHTNER d/b/a FEIGHTNER EXCAVATING COMPANY

ORDER

This matter is before the Court on plaintiffs' motion to strike defendant's demand for jury trial. Plaintiffs are trustees of Central Pension Fund of the IUOE, the Health and Welfare Fund of Local 841, IUOE, and the IUOE Local 103-181 Apprenticeship and Training Fund who brought this action against defendant, an employer, seeking specific performance of certain sections of collective bargaining contracts between the IUOE and a multiple-employer bargaining unit of which defendant allegedly was a member, specific performance of the trust agreements setting up the Central Pension Fund, Health and Welfare Fund, and Apprenticeship and Training Fund, an order requiring defendant to pay delinquent amounts to the trust funds, the terms of which were agreed to by the signatories of the collective bargaining agreements, an accounting to determine the amount of additional contributions required, and an order requiring defendant to make monthly contributions and reports.

Plaintiffs argue that the complaint seeks equitable relief (specific performance and accounting) and the mere fact plaintiffs may receive money does not make the relief legal, requiring a jury trial at defendant's demand. Plaintiffs characterize their action as one brought pursuant to § 502(a)(3) of the Employee Retirement Income Security Act of 1974 [ERISA], 29 U.S.C. § 1132 (a)(3) which states:

> "(a) A civil action may be brought—
>
> * * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provisions of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. . . ."

In addition, plaintiffs contend that their suit, insofar as it prays for specific enforcement of the collective bargaining contract, is also brought under § 301 of the LMRA, 29 U.S.C. § 185(a). Neither of these statutes provide for right to trial by jury. When new causes of action are created unknown to common law, the courts must look to the nearest historical analogy to decide whether there is a right to a jury trial. The test is "whether the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty." *Pernell v. Southall Realty*, 416 U.S. 363 (1974).

Though defendant argues the action is really one for money damages for breach of contract, the complaint and the statutes under which the action is brought demonstrate that this is not the case. In one of the few cases which can be found on the availability of the right to jury trial under § 502 of ERISA, the Court states:

> "ERISA does not specifically address the right to jury trial. However, section 502 . . . sets forth, in the alternative, two remedies which are available to the beneficiary. Section (a)(3) clearly and specifically creates a civil action for equitable relief."

Stamps v. Michigan Teamsters Joint Council No. 43, 431 F. Supp. 745, 747 (E.D. Mich. 1977). The Court then went on to state that a civil action for damages had been created in § 502(a)(1)(B), which authorizes an individual participant or beneficiary to recover benefits under a plan. In the case at bar, plaintiffs are the trustees of trusts created pursuant to ERISA and provisions of the collective bargaining agreement between the IUOE and contractors in a multiple-employer bargaining group. Plaintiffs are not suing for benefits for themselves or for damages for breach of contract but rather, as trustees, for specific performance of the collective bargaining agreement which requires contractors to contribute to the trusts. Any monetary recovery will not be in the form of damages but will be specific relief resulting from enforcement of the contract and terms of the plan. Therefore, the action, whether characterized as arising under § 502(a)(3) or as an action for specific performance of the provision of the collective bargaining agreement requiring the signatory contractors to contribute to the trusts, is equitable and no right to trial by jury exists.

By reason of the foregoing, plaintiffs' motion to strike defendant's demand for jury trial is GRANTED.

IT IS SO ORDERED.

Dated this 5th day of September, 1979.

/s/ William E. Steckler
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP 75-523-C

FORREST BUGHER *et al.*,
Plaintiffs

v.

JACK FEIGHTNER d/b/a
FEIGHTNER EXCAVATING COMPANY,
Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come before the Court for trial, and the Court having considered the evidence, the briefs of the parties and proposed findings of fact and conclusions of law, and being fully informed in the premises, now makes the following findings of fact and conclusions of law.

Findings of Fact

1. The Court has jurisdiction of this matter pursuant to the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132 and the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a).

2. The plaintiff trustees are the trustees of multi-employer Pension, Welfare and Apprenticeship Funds which are maintained pursuant to their respective Trust Agreements. The said Funds are administered in ac-

cordance with the Labor-Management Relations Act, as amended, and the Employee Retirement Income Security Act of 1974.

3. The plaintiff Funds have been established pursuant to various collective bargaining agreements for the purpose of providing and maintaining pension, health, welfare and apprenticeship benefits for employees of participating employers employed as heavy equipment operators within the occupational jurisdiction of the International Union of Operating Engineers.

4. The defendant Company is an employer in an industry affecting commerce and is engaged in the construction industry in the State of Indiana within this judicial district.

5. At all times material hereto the defendant Company has been an active member of the North Central Contractors Association, a multi-employer collective bargaining association authorized to negotiate on the defendant Company's behalf with Local 103, International Union of Operating Engineers, AFL-CIO pursuant to the Constitution and By-Laws of said Association.

6. As an active member of said Association, the defendant Feightner from 1971 through April 1975 regularly attended the meetings of the North Central Contractors Association, at which meetings the status of labor organizations with various labor unions, including Local 103, International Union of Operating Engineers, AFL-CIO, was discussed.

7. Jack Feightner was selected by the North Central Contractors Association to hold various offices including the following: Trustee of the CIAPI (Industry Advancement Fund), Treasurer for the Association, Secretary for the Association, Vice-President of the Association, and a co-negotiator of the Local 103, International Union of Operating Engineers, AFL-CIO and North Central

Contractors Association collective bargaining agreement for the period June 1, 1974 through May 31, 1977.

8. In addition to the personal knowledge of Jack Feightner derived by attendance at meetings, the defendant Company was kept apprised of the activities of the North Central Contractors Association by being forwarded newletters from the Association which related its activities. Certain of those newsletter were prepared by Mr. Feightner while he was Secretary for the Association.

9. As manifested by bargaining history and the Association's By-Laws and Constitution, the Association's negotiators had authority to execute labor contracts on behalf of the Association with labor unions, including Local 103, International Union of Operating Engineers, AFL-CIO, and such actions bound all Association members without any requirement of individual assent or ratification.

10. At the commencement of the negotiation of each agreement, the International Union of Operating Engineers, Local 103, was advised by the Association that the defendant Company was a member and, accordingly, would be bound to the resulting collective bargaining agreement. At no time did the defendant Company give notice to the Association of its intent to withdraw from membership, nor did the defendant Company give such notice to International Union of Operating Engineers, Local 103, or otherwise manifest in writing an intent not to be bound to the collective bargaining agreements.

11. As a member of said Association, the defendant Company was party to a collective bargaining agreement negotiated by the Association with Local 103 which was effective June 1, 1971, and expired May 31, 1974. Further, the defendant Company was also a party to the collective bargaining agreement between the Association and Local 103 which agreement became effective June 1, 1974, and expired on May 31, 1977.

12. The defendant Company during the period subsequent to June 1971 accepted the benefits of the collective bargaining agreements including making use of the referral service provided by the Local Union through its business representative in the hiring of several employees who operated heavy equipment. Moreover, the referral services are specifically described in the collective bargaining agreements and the defendant Company's use of said services indicates Feightner's actual knowledge of the terms of said collective bargaining agreements.

13. Pursuant to the terms of these collective bargaining agreements, an obligated employer is required to make contributions on behalf of the heavy equipment operators in its employ to each of the three funds administered by the plaintiff trustees, based on the number of hours worked by each of the said heavy equipment operators.

14. During the periods covered by the collective bargaining agreements, the defendant Company further ratified the acts of the Association in negotiating on the Company's behalf by submitting a portion of the contributions due to the plaintiff trustees pursuant to said collective bargaining agreements.

15. In June 1974, the defendant Company was delinquent in submitting fringe benefit contributions for the period March 1973 through May 1974. At that time, and in order to correct the delinquency, Feightner agreed with the Local Union business representative in Kokomo to submit two months' payments every month until the Company was on a current basis. Pursuant to that agreement the defendant Company submitted reports for March 1973 and May 1974 to plaintiffs on or about June 6, 1974. At this time the defendant told the Local Union business representative that his failure to make the timely required fringe benefit contributions was the result of his financial problems. The defendant Company did not assert any lack of contractual obligation as the basis for the failure to submit the contributions.

16. In June 1975, the plaintiff trustees, pursuant to the provisions of the Trust Agreements, caused an audit to be performed on the payroll books and records of the defendant Company to determine if the Company had made all required contributions to the respective funds pursuant to the terms of the collective bargaining agreements. The audit included the period January 1, 1973 through May 31, 1975. No records were tendered by the Company for the years 1971 and 1972, nor did the Company provide payroll and wage records of "Laborers" who operated equipment under the International Union of Operating Engineers' jurisdiction.

17. By this partial audit, the plaintiff trustees determined that the defendant Company was delinquent in submission of contributions in the following amounts:

A. Central Pension Fund	$4,574.87
B. Local 841 Health and Welfare Fund	4,498.30
C. Local 103-181 Apprenticeship Fund	744.52
TOTAL	$9,817.69

18. Subsequent to the completion of the audit, the defendant Company submitted a summary of hours worked by members of Local 103 for the period June 1, 1975 through July 30, 1976, which indicated additional amounts due to the plaintiff trustees as follows:

A. Central Pension Fund	$1,888.00
B. Local 841 Health and Welfare Fund	1,888.00
C. Local 103-181 Apprenticeship Fund	236.00
TOTAL	$4,012.00

Plaintiffs are entitled to recover the foregoing delinquent contributions in the total amount of $13,829.69.

19. Article V, Section 5, of the Trust Agreement governing the Central Pension Fund of the International Union of Operating Engineers and Participating Employers, to which terms and provisions the defendant is bound, states as follows:

> "Article V—Section 5. REPORT ON CONTRIBUTIONS. The Employers shall make all reports on contributions required by the Trustees. The Trustees may at any time have an audit made by independent certified public accountants of the payroll and wage records of any Employer in connection with the said contributions and/or reports."

and entitles the plaintiff trustees to audit all periods not previously audited, June 1, 1971 through December 31, 1972, and June 1, 1975 through May 31, 1977, and to audit all payroll and wage records of "Laborers" who operated heavy equipment while in the defendant Company's employ.

20. The Trust Agreement governing the Central Pension Fund provides for the assessment of an interest surcharge and all costs and expenses of collection including audit and attorneys' fees upon a delinquent employer as follows:

> "Article V—Section 4. DEFAULT IN PAYMENT. In addition to any other remedies to which the parties may be entitled, an employer in default for ten working days may be required at the discretion of the Trustees to pay such reasonable rate of interest as the Trustees may fix on the monies due to the Trustees from the date when the payment was due to the date when payment was made, together with all expenses of collection incurred by the Trustees."

In addition, pursuant to the provisions of Section 502(g) of the Employee Retirement Income Security Act of 1974, the plaintiff trustees are entitled to their reasonable attorneys' fees expended in the prosecution of this

matter. Plaintiffs requested an audit fee of $1,643.32 and an award of $19,761.52 for attorney fees. The Court finds the audit fee is reasonable and it will be allowed. In determining the appropriate amount for an award of attorney fees, the Court has considered the factors set out in *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1975). In particular the Court notes that plaintiffs' counsel performs a substantial amount of similar work for the plaintiffs and also that the amount of attorney fees should in part depend on the amount recovered. Based upon these considerations, the Court concludes that a reasonable attorney fee in this action is $6,000.00. Plaintiffs are further entitled to recover an interest surcharge on the delinquent contributions of ten percent (10%) per annum from the date the contributions were required to be submitted.

21. The defendant Company has presented no credible evidence to support a meritorious defense to its obligation to make payment of the amounts determined due to the plaintiff trustees and the vexatious delay in making payment has been the result of bad faith on the part of the defendant Company.

Conclusions of Law

Based upon the foregoing findings of fact, the Court now makes the following conclusions of law.

1. The Court has jurisdiction of this action pursuant to the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(e) and the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a).

2. The plaintiff funds are multi-employer pension, welfare, and apprenticeship funds administered in accordance with the Labor-Management Relations Act and the Employee Retirement Income Security Act and established pursuant to various collective bargaining agreements.

The plaintiff trustees are trustees of the respective plaintiff funds acting in accordance with the respective trust agreements.

3. Defendant was required to contribute to the plaintiff funds and failed to do so.

4. Plaintiffs are entitled to recover of defendant delinquent contributions in the amount of $13,829.69, attorney fees in the amount of $6,000.00, and audit fees in the amount of $1,643.32, together with the costs of this action.

Dated this 1st day of October, 1980.

/s/ William E. Steckler
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP 75-523-C

FORREST BUGHER, *et al.*,
Plaintiffs

v.

JACK FEIGHTNER d/b/a
FEIGHTNER EXCAVATING COMPANY,
Defendant

JUDGMENT

The Court having entered its findings of fact and conclusions of law in the above-captioned matter on this date, now orders entry of judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. That plaintiffs, Forrest Bugher, Richard Wren, Reese Hammond, J. A. McMahon, A. W. McIntyre, Hailey Roberts, John E. Cullerton and Richard E. Dennis, as Trustees of the Central Pension Fund of the International Union of Operating Engineers and Participating Employers, recover from the defendant, Jack Feightner d/b/a Feightner Excavating Company, the sum of Six Thousand Four Hundred Sixty-two Dollars and Eighty-seven Cents ($6,462.87).

2. That plaintiffs, Richard E. Dennis, Donald L. Moritz, Richard M. Kelly, Joe D. Pirtle, Wardell I. Riggs and James Butler, as Trustees of the Health and Welfare Fund of Local 841, International Union of Operating

Engineers, recover from the defendant, Jack Feightner d/b/a Feightner Excavating Company, the sum of Six Thousand Three Hundred Eighty-six Dollars and Thirty Cents ($6,386.30).

3. That plaintiffs, James Butler, William J. Shore, Howard Mills, Jr., Richard Rector, Tom Blackburn, John Schuett, Leon Beatty and Gene Marksbury, as Trustees of the International Union of Operating Engineers Local Union Nos. 103-181 Apprenticeship and Training Fund, recover from the defendant, Jack Feightner d/b/a Feightner Excavating Company, the sum of Nine Hundred Eighty Dollars and Fifty-two Cents ($980.52).

4. That plaintiffs recover from the defendant Company an interest surcharge equal to ten percent (10%) per annum on all delinquent contributions due from the date said contributions became due.

5. That plaintiffs, collectively, recover from the defendant Company the costs of these procedeings to include the sum of Six Thousand Dollars ($6,000.00) as and for plaintiffs' reasonable attorney fees incurred as of January 31, 1980, and One Thousand Six Hundred Forty-three Dollars and Thirty-two Cents ($1,643.32) as and for the cost of the partial audit already conducted.

6. That defendant make available to the firm of Graff, Ballauer & Company, accountants for the funds administered by plaintiffs, within thirty (30) days of the entry of this judgment, its payroll books and records covering the whole of the period set forth in the plaintiffs' complaint for which it is found that contributions are required to be made, and that an account be taken for all previously unaudited periods or individual employee records as to all employees of the defendant covered by the collective bargaining agreement or agreements referred to in plaintiffs' complaint as to wages received and hours worked, and determination be made of amounts due plaintiffs for the period to and including May 31, 1977.

7. That plaintiffs, within thirty (30) days after completion of the audit of the defendant Company's payroll books and records, file such audit in this cause.

8. That plaintiffs are awarded execution for the collection of judgments and costs granted hereunder.

9. The Court hereby retains jurisdiction of this cause and all the parties hereto for the purpose of enforcing this judgment and for entry of a supplemental order in respect to the sums determined due by the audit ordered herein and an interest surcharge thereon, together with all costs and expenses incurred in the prosecution of this matter, including the plaintiffs' audit and attorney fees incurred after January 31, 1980.

Costs of this action shall be taxed against the defendant.

Dated this 1st day of October, 1980.

/s/ William E. Steckler
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil Action No. IP 75-523-C

FORREST BUGHER, *et al.*,
Plaintiffs,

v.

JACK FEIGHTNER, d/b/a
FEIGHTNER EXCAVATING CO.,
Defendant.

SUPPLEMENTAL JUDGMENT ORDER

THIS MATTER coming on to be heard upon the plaintiffs' Motion for Supplemental Judgment, the original Judgment in favor of Plaintiffs' and against the Defendant having been previously entered on October 1, 1980, the Court having considered the additional matters presented by Plaintiffs' Audit Report, heretofore filed December 19, 1980, and the stipulation of the parties as to presentation of all additional matters dated September 23, 1981, and being fully advised in the premises, does hereby render Judgment to supplement its Judgment Order of October 1, 1980, and FINDS:

That the Court has jurisdiction of the parties hereto and of the subject matter hereof.

That Defendant, pursuant to this Court's Order of October 1, 1980, has made available to the Plaintiffs his payroll books and records for the purpose of taking an account as to employees of the Defendant covered by the

Collective Bargaining Agreements referred to in the Complaint of the Plaintiffs to determine additional amounts due Plaintiffs.

That Plaintiffs, by the Certified Public Accounting firm of Graff, Ballauer & Company did complete an audit for the period extending from January 1, 1974 through May 31, 1977, which audit was filed in this cause and forwarded to Defendant on or about December 19, 1980.

Upon such audit, it is determined that there is due and owing, for such audited period, to Plaintiffs, the following sums:

NAME OF FUND	AMOUNT DUE
Central Pension Fund	$3,632.98
Operating Engineers Local 841 Health and Welfare Fund	3,632.98
Operating Engineers Local 103-181 Apprenticeship Fund	642.98
TOTAL	$7,908.94

That Defendant has failed to timely make all contributions required to be made to the Funds administered by Plaintiffs, as provided in the Agreement and Declarations of Trust governing the Funds, Plaintiffs are entitled to recover:

(a) costs and expenses of the Trustees, including their reasonable attorneys' fees incurred since January 31, 1980, in the amount determined reasonable by this Court.

(b) the costs of the audit of the payroll books and records of Defendant incurred from October 1, 1980 to date in the amount of $1,900.02.

(c) an interest surcharge of ten percent (10%) per annum upon the delinquent contributions due amounting to $4,262.61 through August 31, 1981 and thereafter accruing at the rate of $65.91 per month.

That there is no just cause for delay in the entry of a Supplemental Judgment Order as to the sum of $7,908.94 determined due by the aforementioned audit report together with the costs and expenses hereinabove specified.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That Plaintiffs, Forrest Bugher, Richard Wren, Reese Hammond, J. A. McMahon, A. W. McIntyre, Hailey Roberts, John E. Cullerton and Richard E. Dennis, as Trustees of the Central Pension Fund of the International Union of Operating Engineers and Participating Employers, recover from the Defendant, Jack Feightner d/b/a Feightner Excavating Company, the sum of Three Thousand Six Hundred Thirty-two Dollars and Ninety-eight Cents ($3,632.98).

That Plaintiffs, Richard E. Dennis, Donald L. Moritz, Richard W. Kelly, Joe D. Pirtle, Wardell I. Riggs and James Butler, as Trustees of the Health and Welfare Fund of Local 841, International Union of Operating Engineers, recover from the Defendant, Jack Feightner d/b/a Feightner Excavating Company, the sum of Three Thousand Six Hundred Thirty-two Dollars and Ninety-eight Cents ($3,632.98).

That Plaintiffs, James Butler, William J. Shore, Howard Mills, Jr., Richard Rector, Tom Blackburn, John Schuett, Leon Beatty and Gene Marksbury, as Trustees of the International Union of Operating Engineers Local Union Nos. 103-181 Apprenticeship and Training Fund, recover from the Defendant, Jack Feightner d/b/a Feightner Excavating Company the sum of Six Hundred Forty-two Dollars and Ninety-eight Cents ($642.98).

That Plaintiffs recover from the Defendant Company an interest surcharge equal to ten percent (10%) per annum on all delinquent contributions due from the date said contributions became due until paid which the Court determines to be in the amount of Four Thou-

sand Two Hundred Sixty-two Dollars and Sixty-one Cents ($4,262.61) through August 31, 1981 and thereafter accruing at the rate of $65.91 per month.

That Plaintiffs, collectively, recover from the Defendant Company the costs of these proceedings to include the sum of $6,500.00 as and for Plaintiffs' reasonable attorneys' fees incurred from January 31, 1980 through the present date, and One Thousand Nine Hundred Dollars and Two Cents ($1,900.02) as and for the cost of the supplemental audit conducted by Plaintiffs.

That Plaintiffs are awarded execution for the collection of judgments and costs granted hereunder.

Dated this 6th day of November, 1981.

/s/ William E. Steckler
United States District Judge

APPENDIX F

AN ACT
THE NATIONAL LABOR RELATIONS ACT

* * * *

Title III
SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

Sec. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent

to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence

of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of failure to agree within a reasonable length of time, an impartial umpire

to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pension or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, that the requirements of clause (B) of the

proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, that no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under Subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds,

otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SEC. 502

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary or by a participant or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the p[illegible]

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participation or beneficiary in the amount of up to $100 a day from the

date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a) (1) (B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a) (1) (B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the

breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragrath (2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975 (f)(5) of title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more

than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

SEC. 515 Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.